

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

BENNY JAMES MILON

PLAINTIFF

V.

NO. 2:96CV50-B-A

LINDA COOK

DEFENDANT

MEMORANDUM OPINION

This cause comes before the court on the plaintiff's motion to remand. This cause was removed on March 14, 1996 on the ground of diversity jurisdiction.¹ On February 1, 1996 the defendant received by certified mail copies of the complaint and summons. The plaintiff timely moved to remand for untimeliness under 28 U.S.C. § 1446(b) which reads in pertinent part:

The notice of removal of a civil action proceeding **shall** be filed within thirty days after **the receipt by the defendant, through service or otherwise,** of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based....

(Emphasis added.) The defendant asserts that service of process was not perfected until March 18, 1996 when the return receipt was filed.²

¹The notice of removal erroneously cites 28 U.S.C. § 1335 instead of § 1332.

²The return receipt was filed after the defendant, through her attorney, filed the notice of removal and thus had no bearing on deciding when to remove this cause. In fact, the notice of removal asserts: "Service of process has not yet been perfected as to defendant."

The issue is whether receipt of the initial pleading alleging the plaintiff's claim "through service or otherwise" requires proper service of process in accordance with state procedural rules before the removal period commences. A split of authority has resulted in the proper service of process rule, e.g., Hunter v. American Express Travel Related Services, 643 F. Supp. 168 (S.D. Miss. 1986), and the receipt rule whereby the limitations period begins to run when the defendant or its agents authorized to accept service of process receive a copy of the complaint regardless of whether service conforms to state law. E.g., Roe v. O'Donohue, 38 F.3d 298 (7th Cir. 1994); Tech Hills II Associates v. Phoenix Home Life Mut. Ins. Co., 5 F.3d 963 (6th Cir. 1993). The Fifth Circuit has not ruled on this issue. However, the recent reported district decisions in this circuit have followed the receipt rule line of cases instead of Hunter. E.g., Blair v. Williford, 891 F.Supp. 349 (E.D. Tex. 1995); Valle Trade, Inc. v. Plastic Specialties & Technologies, Inc., 880 F. Supp. 499 (S.D. Tex. 1995); City of New Orleans v. Illinois Central R.R. Co., 804 F. Supp. 873 (E.D. La. 1992).

Although state law governs service of process in an action removed to federal court, "state law does not control for purposes of removal." Hughes Constr. Co. v. Rheem Mfg. Co., 487 F. Supp. 345, 347 n. 2 (N.D. Miss. 1980). Since the removal statutes must be strictly construed and the "or otherwise" language is

unambiguous, the court concludes that the receipt rule is better reasoned than the proper service rule. Under the proper service rule, the removal period would commence upon perfected service even if challenged and thus might expire before the court's ruling on the defendant's allegation of insufficient service. The receipt rule is consistent with the limitations period for cases that become removable after commencement -- thirty days after **receipt** of "an amended pleading. . . or other paper from which it may first be ascertained that the case is one which is or has become removable." Notice of removability is the underlying rationale of the receipt requirement. See Uhles v. F.W. Woolworth Co., 715 F. Supp. 297, 298 (C.D. Cal. 1989).

The defendant's attorney complains that the plaintiff's attorney failed to advise him that the defendant had been served with process, regardless of two written requests to be so advised. A letter from the plaintiff's attorney accompanying the delivered copies of the complaint and summons requested the defendant to notify her attorney and even set out her attorney's address and phone number. Since the correspondence submitted by the defendant indicates her attorney's anticipation of the filing of this cause, the court finds that the defendant's attorney should have instructed **his client** to notify him. In any event, the defendant's attorney cannot impose upon the plaintiff's attorney a procedural requirement not encompassed in the applicable rules. Since notice

through receipt on the part of the defendant, as opposed to the defendant's attorney, is decisive as to when the limitations period begins to run, the court finds that any delay in giving notice to the defendant's attorney of the defendant's receipt of process did not toll the limitations period.

The notice of removal was filed forty-two days after the defendant's receipt of process and is therefore untimely. The thirty-day period for removal is mandatory and, absent any waiver, remand is required if notice of removal is not timely filed. York v. Horizon Fed. Sav. & Loan Ass'n, 712 F. Supp. 85, 86-87 (E.D. La. 1989) (citing Royal v. State Farm Fire and Casualty Co., 685 F.2d 124, 127 (5th Cir. 1982)). Therefore, the instant motion should be granted and this cause should be remanded on the basis of a defect in removal procedure pursuant to 28 U.S.C. § 1447(c).

An order will issue accordingly.

THIS, the _____ day of April, 1996.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE